No. 82-386

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ALEXANDER L. STEVAS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KERR-McGEE CHEMICAL CORPORATION,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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TABLE OF AUTHORITIES

PAGE

Cases

Avco Corp. v. *Aero Lodge No. 735*, 376 F. 2d 337 (6th Cir. 1967), *aff'd* 390 U. S. 557 (1968) 1, 2

Brough v. *United Steelworkers of America*, AFL-CIO, 437 F. 2d 748 (1st Cir. 1971) 3

First Federal Savings & Loan Ass'n v. *Greenwald*, 591 F. 2d 417 (1st Cir. 1979) 3

Lafferty v. *Solar Turbines International*, 666 F. 2d 408 (9th Cir. 1982) 2, 3

North American Phillips Corp. v. *Emery Air Freight Corp.*, 579 F. 2d 229 (2d Cir. 1978) 3

Till v. *Unifirst Federal Savings & Loan Ass'n*, 653 F. 2d 152 (5th Cir. 1981) 3

Vitarroz Corp. v. *Borden, Inc.*, 644 F. 2d 960 (2d Cir. 1981) 3

Statutes

28 U. S. C. § 1441 2

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Petitioner, Kerr-McGee Chemical Corporation, submits this reply to the Brief in Opposition of the Respondent, State of Illinois ("Opp. Cert. ____").

I.

THE RELEVANT DECISIONS OF THIS COURT CONFLICT WITH THE DECISION BELOW

Respondent's "unbroken line of Supreme Court cases," which purportedly "compelled" the decision below, is actually a roster of unrelated decisions involving actions where compliance with federal laws may have provided some defense to state-law actions. (Opp. Cert. 4). These are not cases of federal preemption, with one exception: *Avco Corp.* v. *Aero Lodge No. 735,* 390 U. S. 557 (1968). Respondent asserts that in *Avco,* the complaint "necessarily" plead a federal cause of action (despite the plaintiff's express disavowal of reliance on

federal law, *Avco Corp.* v. *Aero Lodge No. 735*, 376 F. 2d 337, 339 (6th Cir. 1967)), and was therefore properly removed (Opp. Cert. 5). This is true and it is precisely what occurred in this action. Notwithstanding respondent's similar attempt to disavow reliance on federal law, the complaint admittedly attempts to regulate the disposal of on-site wastes from an NRC-licensed facility which are "contaminated radiologically" (Opp. Cert. 2). Preemption renders this claim "necessarily" federal in nature.[1] Consequently, as in *Avco*, this case is removable under 28 U. S. C. § 1441.

II.

AN IRRECONCILABLE CONFLICT AMONG THE CIRCUITS EXISTS

Respondent argues that the conflict among the circuits demonstrated in the petition is an "illusion" and falls back on legal shibboleths, such as "implicitly overruled" and "anomaly," usually reserved for adverse cases which cannot be distinguished. (Opp. Cert. 5). The distinction which respondent uses to explain away the conflicting decisions of the courts of appeals is one between cases where the preemptive federal law afforded plaintiff a recovery and those in which it did not. This is respondent's distinction, not that of the courts of appeals, and it does not reconcile the obvious conflict. Plaintiff's right to recover should never determine the existence of federal jurisdiction. Moreover, as the respondent concedes (Opp. Cert. 6, 8), at least two courts of appeal have held that federal preemption affords a basis for removal when the preemptive law does not afford plaintiff a right of recovery on

[1] The court below assumed federal preemption here for purposes of its decision on removal jurisdiction and therefore did not have to review the district court's determination that the respondent's complaint is preempted. (A. 10-11).

its claim. *See Lafferty* v. *Solar Turbines International,* 666 F. 2d 408 (9th Cir. 1982); *North American Phillips Corp.* v. *Emery Air Freight Corp.,* 579 F. 2d 229 (2d Cir. 1978).

In the Ninth Circuit, the decision in *Lafferty* remains the most recent pronouncement directly on point, expressly approving removal based on federal preemption despite plaintiff's concession that federal law barred recovery in that case.

In the Second Circuit, *North American Phillips* continues to stand as the law of that Circuit, despite respondent's argument that *Vitarroz Corp.* v. *Borden, Inc.,* 644 F. 2d 960 (2d Cir. 1981) undercut *North American Phillips.* In *Vitarroz,* the court approved removal on other grounds, and did not even refer to federal preemption. 644 F. 2d at 964-65.

Respondent's characterization of the law in the First Circuit is inaccurate.[2] Preemption was not at issue on the removal in *Brough* v. *United Steelworkers of America,* 437 F. 2d 748 (1st Cir. 1971). (Opp. Cert. 6). Moreover, the most recent statement by the First Circuit emphasizes that the issue of federal preemption-based removal "is not easy" and "given this uncertainty" in the circuits (and the fact that the court did not have to decide the issue there), the First Circuit "preferred not to resolve [the conflict]." *First Federal Savings & Loan Ass'n* v. *Greenwald,* 591 F. 2d 417, 423 (1st Cir. 1979).

The respondent's resort to characterization, without explanation, of the conflict in the circuit court decisions is highlighted by its treatment of the more than thirty conflicting decisions in the last six years alone issued by more than twenty district courts (Pet. for Cert. 9-10). Respondent implies that the majority of these courts must be wrong but if there is "a

[2] The Fifth Circuit decision cited by the respondent (*Till* v. *Unifirst Fed. Savings & Loan Ass'n,* 653 F. 2d 152, 155 (5th Cir. 1981)) is similarly mischaracterized. (Opp. Cert. 7). It is not a preemption case at all. The court there simply affirmed jurisdiction of an action based on federal law.

problem" it should be remedied by the courts of appeals (Opp. Cert. 6). This ignores a fundamental purpose of certiorari jurisdiction which is to resolve such conflicts and provide guidance to the lower courts on significant jurisdictional issues.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit for the reasons stated in the petition for certiorari.

Respectfully submitted,

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